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No. 88-1068

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In The

Supreme Court of the United States

October Term, 1988

SUKETU H. NANAVATI, M.D.,

Petitioner,

vs.

BURDETTE TOMLIN MEMORIAL HOSPITAL and EXECUTIVE COMMITTEE OF THE MEDICAL STAFF OF THE BURDETTE TOMLIN MEMORIAL HOSPITAL,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW - RESTATED

1. Is the abuse of discretion by the trial court in granting a mid-trial amendment permitting Petitioner to name the Executive Committee and Hospital as Sherman Act § 1 defendants an appropriate topic of Supreme Court review?

2. Does the decision of *American Society of Mechanical Engineers v. Hydrolevel Corp.* compel reversal of the Third Circuit's affirmance of the judgment notwithstanding the verdict where the only alleged conspirators (never identified below) had neither economic motivation nor standing separate and distinct from either the Hospital or the Executive Committee so as to meet the multiplicity requirement of a Sherman Act § 1 claim?

3. Does the decision of *Continental Ore Co. v. Union Carbide Corp.* compel reversal of the Third Circuit's affirmance of the judgment notwithstanding the verdict where Petitioner failed to present a Sherman Act claim to the jury premised upon the Komansky contract for the provision of echocardiograms and stress test services and where Petitioner failed to allege or prove the necessary elements of either an illegal exclusive dealing or tying arrangement?

4. Is Petitioner entitled to an award of nominal damages and counsel fees where he failed to request nominal damages at trial, failed to prove any illegal anti-trust motivation on the part of the Executive Committee and/or the Hospital, failed to prove that any one possessed of anti-trust motivation had acted with or on behalf of the Executive Committee and/or the Hospital, failed to prove the relevant product and geographic markets and failed to prove damages?

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BRIEF IN OPPOSITION FOR RESPONDENTS

STATEMENT OF THE CASE

The removal of Dr. Nanavati from the Medical Staff the Burdette Tomlin Memorial Hospital (hereinafter "Hospital") came as the result of fifteen separate charges and specifications focused,

principally, upon his disruptiveness. This was characterized by repeated failures to observe Hospital admission practices, Hospital rules in general and expected norms of ethical conduct both towards patients and the nursing staff (2057a-2059a) as well as efforts to supplant Dr. Robert Sorensen as the Chief of the Cardiology Department, highlighted by continued attacks on Sorensen's competence. With specific reference to the charges against Dr. Nanavati, the New Jersey Superior Court citing the Appellate Division below stated:

> unfair criticism tending to break down nursing staff morale and discipline, inquiry to a patient as to why she had chosen another doctor and preemption of hospital beds contrary to admissions policy were among defendant hospital's charges against plaintiff. In our view, none of the foregoing charges, as examples of the fifteen charges against plaintiff, were petty personality grievances or inadmissible against plaintiff in hospital disciplinary proceedings until proof of actual adverse effect on patient care.

Nanavati v. Burdette Tomlin Memorial Hospital, 107 N.J. 240, 247 (1987).

Nanavati's conduct was accurately perceived as having personal economic aggrandizement as its source:

> Dr. Nanavati had engaged in continuous course of conduct which was totally disruptive of hospital routine which conduct was motived by economic purposes.

(2016a).

In essence, Nanavati, angered by Dr. Sorensen's failure to

instantaneously, upon Nanavati's arrival at the Hospital, provide him with days to read EKG's, set about undermining Dr. Sorensen's reputation for competence. In a meeting of the assembled Medical Staff on April 3, 1979 (approximately 4 weeks after his arrival at the Hospital) Nanavati rose and labeled Dr. Sorensen an "inferiorly qualified" physician in an unabashed effort to wrest the exclusive right to read EKG's from him.

Moreover, Nanavati's subsequent and widely disseminated claims that the only member of the Medical Staff whose practice was in competition with that of his own, Dr. Sorensen, was committing medical malpractice and even killing patients, were never proven. Rather, such claims were rejected by the jury which found them actionable in the aggregate amount of $1,150,000 — against him.[1] Not so mysteriously, when the Executive Committee intervened and requested of Dr. Sorensen (ultimately successfully) that EKG days be accorded Nanavati, his first wave of attacks on Dr. Sorensen abated.

No element of the "taint" in the deliberative processes of either the Medical Staff or Board of Governors in their determination to remove Nanavati from the Medical Staff and resulting in the trial court's collateral estoppel finding was based upon economic motivation. In this regard, and contrary to Nanavati's current assertion that "there existed no legitimate explanation for the Hospital's conduct" (Petition p. 13), the jury expressly found as a fact (determined to be a "supported finding" by the Third Circuit; A44) that the conduct directed toward Nanavati was premised upon his own "unprofessional behavior or violations of public service or other ethical norms." (A82).

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1. The Third Circuit ultimately reversed this judgment on the ground that Nanavati's oral statements constituted protected opinion inasmuch as they had been uttered to newspaper reporters steeped in the lengthy personal feud between Drs. Sorensen and Nanavati (A11-A21).

No proof was introduced from any of the witness/patients or ER physicians called by Nanavati to corroborate his present ER "boycott" theory that the source of such interference came from anyone other than Dr. Sorensen — the individual wholly exonerated by the jury and whose continued involvement has been expressly foreclosed by Petitioner pursuant to R. 19.6. Similarly, Nanavati introduced no proof that the Hospital, ER nurses or physicians had any interest at economic odds with him. Yet, Nanavati maintains that the Hospital "acted in furtherance of unlawful conduct of others." (Petition p. 13). This is allegation, nothing more.

Nanavati contends that the Hospital "sought out" Dr. Komansky in 1983 to solicit the ultimate August 1983 execution of the contract on the part of the Komansky Professional Association (hereinafter "Komansky Contract") to read echocardiograms and stress tests[2] and in so doing authorized "monopoly prices" for "inferior service." (Petition p. 12). Here again the trial record fails to support Nanavati's assertions.

Komansky initiated the contact by inquiring about the placement of his stress test lab in the Hospital (Trial Tr., 6/30/86, 105:16-25). Upon examination it was revealed that Nanavati actually charged $400 for these tests in his office and that his "bargain basement" $100/test price was premised upon the

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2. Nanavati ignores the fact that by August 1983, the date of the Komansky Contract, he had filed two EEOC complaints alleging disparate treatment on the basis of race and national origin (claims rejected by the jury) and one lawsuit each in state and federal forums naming the Hospital as defendant. Nanavati further forgets that he personally withdrew a previously included request to perform echocardiograms and stress tests from his application for renewed privileges which covered the period of the exclusive contract at issue (7010a-7011a). Moreover, he failed to object to that portion of the jury charge which stated that the Hospital was not obligated to put the contract out for bid (Trial Tr., 7/15/86, 46:18-24).

Hospital supplying and maintaining the equipment and providing a techinician, medical malpractice coverage and the like (Trial Tr., 6/5/86, 49:2-10). There is no proof that the Komansky group provided "inferior service." (Trial Tr., 6/5/86, 44:7-45:7). The record is void of proof that Nanavati would provide the same or superior service as Komansky for less, and there was no proof regarding the actual market price for echocardiograms and stress tests, a necessary predicate to the labelling of the Contract as monopolistic.

Similarly there is no proof that the Hospital had any degree of "market power" in the provision of in-patient cardiac care with respect to patients who required echocardiograms or stress tests. Rather, the testimony at trial, which was undisputed and voluminous, was that the Hospital had no special province over the provision of cardiac care ("special and superior" brand practiced by Nanavati or any other form) to any collection of individuals within any specific geographic confine. Physicians at the Hospital referred patients to cardiologists other than Dr. Sorensen who were outside of the immediate area of the Hospital. For example, Dr. Gelzunas referred to Drs. Robert and Michael Katz in Somers Point and Drs. Ziccardi and Datesman in Atlantic City (7000a). Even Nanavati testified that specialty cardiac care patients from the immediate area chose to be treated other than at the Hospital.

> Q. Do you know anybody else who treated cardiology patients?
>
> A. People used to go to Philadelphia, Shore Memorial (in Somers Point), Northfield.

(7001a).

Moreover, Nanavati ignores the fact that on the one occasion

when he requested use of the Hospital echocardiogram machine, he was permitted (7003a). As the Komansky Contract makes clear, the Hospital charged *only* for its own expenses/services. Physician/professional services were billed independently and directly by the physician to the patient on a "fee for service basis." (3128a). The Hospital was not, by definition, a competitor in the field of the "exclusive" service provided by Komansky's group. Finally, there is no proof that Nanavati could not or did not market his services as an echocardiogram and stress test reader elsewhere — *i.e.*, in the context of a nationwide market.

From a procedural standpoint, the Executive Committee and Hospital should never have been required to defend a Sherman Act § 1 claim. On November 17, 1982, prior to the filing of the federal court action, Nanavati filed a state court action seeking an injunction reinstating him to the Medical Staff. He failed at that time to set forth either an anti-trust, § 1981, or a 42 U.S.C. § 2000(e) claim despite the then existence of all facts subsequently relied upon by him in the filing of the instant federal action. The original federal complaint, Civil Action No. 83-0794, was filed by Nanavati on March 8, 1983 and asserted in Count I, liability, only as to the Hospital and Executive Committee, for violation of 42 U.S.C § 1981 and § 2000(e), *et seq.* (Title VII). In Count II, brought only against Dr. Sorensen, Nanavati asserted common law liability for interference with business and defamation.[3]

On May 10, 1984, Dr. Sorensen filed a three count complaint, Civil Action No. 84-1790, against Nanavati. Count I asserted a claim for "restraint of trade." Count II asserted damages for slander and Count III claimed damages for interference with business, based upon slander. Nanavati, in his counterclaim

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3. All of these claims were either dismissed as a matter of law during trial (Title VII) or "no caused" by the jury. Nanavati's defamation claim was dropped at the final pre-trial conference on May 12, 1988.

thereto, reflexively sued Dr. Sorensen *only* in "restrain [of] trade" without specification as to the statutory basis, legal theories involved or the "conspirators" implicated.

Neither Nanavati nor Dr. Sorensen (and, obviously, neither the Hospital nor the Executive Committee) obtained, pre-trial, the services of an expert in medical/population demographics. No written discovery was propounded upon Nanavati by the Hospital or Executive Committee to elicit the identity of the conspirators, their intent, or the effected product and geographic market as, prior to trial, there was no need.[4] The trial court permitted Nanavati during the sixth week of a nine week trial (and subsequent to defendant's motions for directed verdict) to, in essence, amend his counterclaim in C.A. No. 84-1790 to add the Executive Committee and Hospital as the Section 1 defendant, co-conspirators of Dr. Sorensen. The legal maelstrom that followed, as reflected in the Third Circuit's opinion, has resulted in a jumbled factual and procedural morass, only a portion of which is now before this Court. While this case was indeed rife with issues prior to their resolution by the Third Circuit, that Court's holding failed to exhibit conflict with those Supreme Court rulings now cited by Nanavati. Moreover, the issues embodied therein fail to raise "important question(s) of federal law," a prerequisite for the discretionary grant of a Petition for Writ of Certiorari. Rule 17.1(c).

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4. Had Nanavati proven Dr. Sorensen as the sole competitor and "ringleader", as alleged in his pre-trial, he need not have sought the mid-trial amendment inasmuch as his right of recovery under the Sherman Act was deemed joint and several. *Uranium Anti-Trust Litigation,* 617 F.2d 1248 (7th Cir. 1980). Moreover, there would have existed no right of contribution by Sorensen even from proven co-conspirators, unnamed as defendants. *Texas Industries, Inc. v. Radcliffe Materials,* 451 U.S. 630 (1981). Thus, Nanavati could have recovered his anti-trust damages (if any) from Dr. Sorensen alone and the Executive Committee and Hospital would have been immune from Sherman Act liability prior to the amendment.

REASONS FOR DENYING THE WRIT

I.

The abuse of discretion by the trial court in granting the mid-trial amendment adding anti-trust claims against the Executive Committee and Hospital is not an appropriate topic of Supreme Court review on certiorari.[5]

Anti-trust issues of substance cannot be resolved adverse to Respondents (and therefore those questions raised in the petition even addressed) unless and until Nanavati's mid-trial amendment, ensnaring the Executive Committee and Hospital in his ever-changing[6] net of anti-trust conspiracy, is found not be an abuse of discretion by the trial court. Clearly, such a fact specific issue does not comport with the requirements of Rule 17.1(c). The law in this regard is not in need of further explication. *See Foman v. Davis,* 371 U.S. 178 (1962).

Below Nanavati neglected to explain why he waited until the sixth week of the nine week trial, after the close of his proofs, to seek the amendment but for which no verdict would have been obtained in his favor. In *Adams v. Gould, Inc.,* 739 F.2d 858, 868 (3rd Cir. 1984), *cert. denied,* 469 U.S. 1122 (1985), the Third Circuit recognized the importance of determining a party's motive

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5. Neither the trial court in the context of post-trial motions nor the Third Circuit dealt with the merits of this ruling.

6. In his actual pleadings, Nanavati named only Dr. Sorensen as the individual who restrained his trade — a clearly non-actionable allegation under § 1 in the absence of other actors. In his pre-trial, *as amended,* Nanavati named Dr. Sorensen, the Executive Committee and the Hospital as the co-conspirators. On appeal, his web of intrigue has seemed to have expanded to virtually anyone who did not like him and/or felt he over-medicated and over-billed patients (*e.g.,* Drs. Renza and Haflin).

in delaying an amendment, stating:

> The passage of time, without more, does not require that a motion to amend a complaint be denied; however, at some point the delay will become "undue" placing an unwarranted burden on the court, or will become "prejudical" placing an unfair burden on the opposing party.

The questions of undue delay and bad faith require a focus on Nanavati's motive(s) for not amending his complaint earlier. Nanavati has been, at all times, alarmingly silent as to why it took him three years of litigation and six weeks of actual trial to "remember" to amend his pleadings to include the Executive Committee and the Hospital as § 1 defendants (Trial Tr., 8/14/86, 109:11-25--110:1-18). Obviously, the application to amend came at the point in trial when Nanavati realized that his conspiracy claim, with Dr. Sorensen at its hub, was not being believed by the jury. His realization proved accurate.

Nanavati's representation that "experienced" anti-trust counsel became involved in this matter only after the pleadings were "closed" is unpersuasive, as present counsel became involved in *August of 1985* and no mention of an intent to amend was ever made until *after* Nanavati rested eleven months later. "When there has been a lack of diligence, the burden shifts to the movant to prove that the delay was to due to excusable neglect." *Chitamacha Tribe of Louisiana v. Harry L. Laws Co.*, 690 F.2d 1157, 1163 (5th Cir. 1982), *cert. denied*, 464 U.S. 814 (1983) (*cited with approval in Adams v. Gould Inc.*, 739 F.2d at 868). Nanavati has failed to respond in the face of this burden. *See Serrano Medina v. United States*, 709 F.2d 104, 106 (1st Cir. 1983); *Mende v. Dunn & Bradstreet Inc.*, 670 F.2d 129 (9th Cir. 1982); *DeBry v. Trans America Corp.*, 60 F.2d 4801 (10th Cir. 1979); *Deakyne v. Commissioners of Lewes*, 416 F.2d 290 (3rd Cir. 1969). Nanavati

implicitly contends that the Respondents were in no need of discovery or expert testimony with respect to the Sherman Act claims brought against them. In argument to the Third Circuit Nanavati relied upon statistics collected by the Hospital indicating what percentage of patients came from Cape May County as proof of an element of his Sherman Act claims: *i.e.*, geographic market area. Nanavati's conclusion as to the legal significance of those statistics is undeniable proof of the high degree of prejudice suffered by Respondents as a result of the amendment. The answer to the question, what percentage of the Hospital patients come from Cape May County, is not proof of geographic market, as claimed by Nanavati. Rather, the answer to the question, what percentage of the total potential cardiac care patients in the patient base Cape May County (or whatever an appropriate geographic confine would be) actually go *to the Hospital* by virtue of its "market power" instead of elsewhere, is the appropriate anti-trust inquiry. *See Jefferson Parish Hospital Dist. No. 2 v. Hyde,* 466 U.S. 2 (1984); *Weiss v. York Hospital,* 745 F.2d 788 (3rd Cir. 1984), *cert. denied,* 470 U.S. 1060 (1985). On this point, the record is silent. Moreover, Respondents were totally deprived of the opportunity to conduct an appropriate demographic study to ascertain where Cape May County cardiac patients actually go for such specialty care and to place that geographic market analysis before the jury in the form of appropriate lay and expert testimony. Thus, while Nanavati's § 1 case contained no new facts (how could it, given that Nanavati had rested when he moved to amend) the newly named § 1 Respondents *should have* been given the opportunity to gather relevant facts and prepare all attendant legal issues necessary to their defense in advance of trial.

In essence, the trial court's ruling permitting the belated amendment would place *all* defendants in *all* matters on notice that they are under an affirmative obligation to devine and fully prepare (including preparation of anticipated discovery and expert's reports) for each and every claim of any nature arguably

implicated by the facts of a plaintiff's case, whether such claims are or are not pled. This is contrary to the rule of *Foman*, 371 U.S. 178. Moreover, such a finding condones "trial by ambush" and renders meaningless the discovery provisions of the Federal Rules. The ultimate irony, of course, is Nanavati's strategy to "amend in" such complex claims *during trial* (despite his counsel's representations that the very same amendment *could not* have been made in August of *1985* because Magistrate Simandle had, by order, "closed" the pleadings) so as to set up Respondents to a claim that they waived objections to the admitted deficiencies in his case.

The Third Circuit, in evident recognition of the inherent unfairness to Respondents, nonetheless addressed the full compliment of substantive flaws raised by defendants, as it was empowered to do. *See Palmiero v. Spada Distributing Co.*, 217 F.2d 581 (9th Cir. 1951); *U.S. Industries Inc. v. Semco Manufacturing Inc.*, 562 F.2d 1061 (8th Cir. 1977), *cert. denied*, 434 U.S. 986 (1978); *Miller v. Premier, Inc.*, 608 F.2d 973 (4th Cir. 1979); *Camillo v. Sameit Westbulk*, 514 F.2d 1214 (1st Cir. 1975), *cert. denied*, 423 U.S. 1014 (1975); *O'Brien v. Willy's Motors Inc.*, 385 F.2d 163 (5th Cir. 1967).[7] Moreover, special verdicts, such as the one in this case, are governed by Rule 49(a), which does not require objections before discharge of the jury. *See, e.g., Malley-Duff Assoc. Inc. v. Crown Life Ins. Co.*, 734 F.2d 133, 144-145 (3rd Cir. 1984), *cert. denied*, 469 U.S. 1072.

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7. Finally, in this regard, is Nanavati's violation of the Rule against issue splitting by failing to have incorporated in the state court action all then existing claims subsequently set forth herein. Had the trial court properly granted Respondents' pre-trial motion on this basis, they would not have been the unwitting recipients of the mid-trial amendment.

II.

This Court's decision in *American Society of Mechanical Engineers v. Hydrolevel Corp.* is not in conflict with the opinion below.

Nanavati now endeavors to lift an abstract rule out of *American Society,* factually wed to the unique circumstances therein, and apply it to this action without regard to the rationale behind the Third Circuit's holding in affirming the judgment notwithstanding the verdict. Briefly, in *American Society,*[8] Hydrolevel successfully entered the low water fuel cut-off market and, in so doing, secured an important former customer of McDonnell & Miller ("M&M"). In both retaliation and an admitted effort to undermine Hydrolevel's image and standing in the market, M&M employees conspired with representatives of defendant, ASME (themselves financially involved with an entity in the process of negotiating the purchase of M&M), for the express purpose of drafting a position paper criticizing the safety of the Hydrolevel low water fuel cut-off device. This document, having been conjured so as to undercut Hydrolevel's market share, was subsequently distributed by M&M salesmen to the public resulting in the desired effect. Thus, the solitary issue before the *American Society* Court was whether the non-profit membership corporation itself could be liable where its agents, acting within their apparent authority, sought to use the corporate entity as the device to further their individualized, conspiratorial and admittedly anti-competitive ends.

No proof exists in the record below to render the *American Society* rule applicable herein inasmuch as neither the nurses or

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8. Of no small consequence was the failure of Nanavati to rely upon either *American Society or Continental Ore,* (Point III, *infra*) in his argument and Brief to the Third Circuit.

ER physicians referred to by Nanavati in his Petition as having carried out the "boycott" had any proven (or even alleged) anti-competitive or economic based motivation to conspire with anyone. Nor does proof exist that the Hospital, which quite naturally (albeit nonprofit), derives income from the work of its physicians on staff, had any such motive. To improperly direct the flow of ER patients from Nanavati to anyone else would fail to enhance the Hospital's economic ends. Moreover, the record is void of proof from which an inference can be drawn that any of the individual physicians (admittedly not acting as agents of the Hospital, *see* Petition p. 9), who reportedly desired to cut the flow of patients to Nanavati, conspired with anyone in the ER. Those physicians were neither factually linked to Nanavati's named conspirators nor named as defendants themselves. Finally, in this regard, no evidence exists that the Executive Committee, acting as an entity, had any involvement in the ER "boycott" alleged by Nanavati. Nanavati's dilemma is best expressed in *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 949 (6th Cir. 1983).

> The appellant must provide some factual bases upon which to find that the ostensibly independent referral decisions of the emergency room physicians are part of some concerted design between the two defendants or one defendant and some other conspirator. They have not done so.

The ER nurses and physicians, individual agents who are employees of a corporate entity, the Hospital, operating without the motive of a "personal stake" separate and apart from their corporate employer (unlike the individuals/conspirators in *American Society*) are not deemed separate economic entities for purposes of the multiplicity requirement of a § 1 conspiracy. At all times they acted as agents of the Hospital.

Since a hospital cannot conspire with itself, there

> can be no conspiracy as a matter of law. In order for an illegal Sherman Act conspiracy to exist, there must be two independent economic entities.

Friedman v. Delaware County Memorial Hospital, et al., 672 F. Supp. 171, 181, *aff'd*, 849 F.2d 600 (3rd Cir. 1988); *Potters Medical Center et al. v. The City Hospital Association et al.*, 800 F.2d 568 (6th Cir. 1986); *Tose v. First Pennsylvania Bank*, 648 F.2d 879 (3rd Cir. 1981), *cert. denied*, 454 U.S. 893 (1981).[9] As to this rule, the Supreme Court has already and clearly spoken. *Copperweld Corp. v. Independent Tubing Corp.*, 467 U.S. 752 (1984).

In order for the potential of a conspiracy, such as that in *American Society* to exist, there must be some degree of "economic sense" motivating the involvement of the participants.

> [I]f petitioners had no rational *economic* motive to conspire, and if their conduct is consistent with other equally plausible explanations, the conduct does not give rise to an inference of conspiracy. (Emphasis supplied.)

Matsushita Elec. Ind. Co. v. Zenith Radio Corp., 475 U.S. 574, 596-597 (1986); *Monsanto v. Spray-Right Service Corp.*, 465 U.S. 752 (1984); *Friedman v. Delaware County Memorial Hospital*, 672 F. Supp. at 190; *Pontius v. Childrens Hospital*, 552 F. Supp. 1352, 1376 (W.D. Pa. 1982).

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9. Clearly, the finding of requisite multiplicity in the form of the Executive Committee acting as an entity is of no moment where no factual link exists between the alleged injury and the conduct of the "combination." Therefore, the Hospital cannot be found liable for conduct of the Executive Committee as a matter of fact even if they could conspire as a matter of law, which they cannot. *See Weiss v. York Hospital*, 745 F.2d 786 (3rd Cir. 1984), *cert. denied*, 470 U.S. 1060 (1985).

While anti-competitive motive and/or effect may suffice for civil Sherman Act liability, a *conspiracy* itself, nonetheless, must still be shown. At a minimum, a § 1 plaintiff must still show that defendants combined or conspired with the intent to restrain trade. *E.g., Perma Life Mufflers, Inc. v. International Parts Corp.*, 392 U.S. 134, 141-142 (1968); *Smith v. Northern Michigan Hospital,* 703 F.2d at 949. Simple refusal to deal cannot support anti-trust liability. *First National Bank of Arizona v. Cities Service Co.*, 391 U.S. 253 (1968). The jury found that Nanavati was "boycotted" not as a result of the Hospital's and Executive Committee's alleged desire to eliminate a competitor, a necessary ingredient to a finding of a conspiracy, but rather due to his inability to get along and work harmoniously with others. Thus, the rule of *American Society* simply does not apply to the instant case, much less stand in conflict with the Third Circuit ruling below.[10]

III.

This Court's decision in *Continental Ore Company v. Union Carbide Corp.* fails to support Petitioner's unasserted claim for § 1 liability based upon the Komansky Contract.

Continental Ore may only be obliquely applied herein and solely for the universally acknowledged proposition that the evidence must be analyzed as a whole. Even a cursory review of the Third Circuit's opinion reveals that that is precisely what the court did. Indeed, both the trial court and the Third Circuit indulged Nanavati far beyond the pale of his asserted conspiracy among Dr. Sorensen, the Executive Committee and Hospital by

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10. Other substantive failings exist in Nanavati's ER "boycot" theory — *i.e.*, failure to prove product or geographic market, failure to name any of the shadow, non-defendant conspirators in the pleadings or pre-trial, even as amended. *Garshman v. Universal Resources Holding Inc.*, 641 F. Supp. 1359, 1367-1390 (D.N.J. 1986), *aff'd,* 824 F.2d 223 (3rd Cir. 1987).

examining the record for any previously unstated combination or permutation of conspirators.

Nanavati now contends that he set forth a claim at trial for a § 1 violation based upon the exclusive Komansky Contract to read echocardiograms and stress tests. However, a review of both the pre-trial and the charge to the jury reveals that the Komansky Contract was submitted to the jury solely to prove a violation of 42 U.S.C § 1981 based upon racial discrimination, a claim since abandoned by Nanavati (Trial Tr., 7/15/88, 45:18-47:11). The trial court and Third Circuit thus need not have reviewed the substance of the exclusive contract claim.[11] The Third Circuit accurately found that Nanavati had only submitted the issues of revocation of privileges and boycott to the jury for anti-trust consideration. The "exclusive" contract anti-trust claim was, therefore, waived. Fed. R. Civ. Proc. 51.

In any event, analysis of the substance of the Komansky Contract (assuming its characterization as a § 1 target) reveals multiple flaws. First, Nanavati sought either merely to supplant his exclusive services for those of Komansky or to add his name to the list of providers (3132a). "Merely changing exclusive contractors . . . cannot constitute a violation of the anti-trust law." *Drs. Steuer and Latham v. Nat. Med. Enterprises,* 672 F. Supp. 1489, 1502 (D.S.C. 1987). Second, no proof exists in the record that Nanavati could not and/or did not market his skills as an echocardiagram and stress test reader throughout the country.

In *Jefferson Parish Hospital District No. 2 v.*

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11. It would be irrational for Nanavati to now argue that the Hospital and Executive Committee somehow waived objection to his submission of the Komansky Contract as part of his anti-trust proofs by failing to make a directed verdict motion with respect to it where that Contract was never submitted to the jury as part of his anti-trust proofs and where the amendment making them Sherman Act defendants came after motions for directed verdict.

> *Hyde,* 466 U.S. 2, 104 S. Ct. 1551, 80 L. Ed. 2d (1984) the Supreme Court confirmed that adisappointed competitor who must practice elsewhere does not constitute "anti- trust" injury.

Id. at 1501; *Collins v. Associated Pathologists, Ltd.,* 676 F. Supp. 1388, 1396 (C. D. Ill. 1987), *aff'd,* 844 F. 2d 473 (7th Cir. 1988). The abiding state of competition, not individual competitors, are to be protected by the anti-trust laws. *Brown Shoe Company v. United States,* 370 U.S. 294 (1962). Third, the supposed price discrepancy between the Komansky group's and Nanavati's charges is of no anti-trust consequence. Even assuming the discrepancy claimed by Nanavati existed (which it, in fact, did not) it would not establish anti-trust liability,

> [B]ecause the relevant inquiry is not whether prices have increased, but whether they have increased over the competitive level. Plaintiff, however, failed to offer any evidence regarding competitive pricing levels.

Drs. Steuer and Latham, 672 F. Supp. at 1502. The only other proof of "competitive" pricing levels in the record was Nanavati's charge of $400 per test, fully $200 more than that charged by the Komansky group.

Assuming, *arguendo*, that the Contract is viewed as a tying arrangement (although never labeled as such by Nanavati), similar failings abound. No proof was introduced that consumers of echocardiagram and stress test services viewed such services as separate and distinct from other in-hospital services for which a separate economic market existed — the entry criteria of a tying case. *Jefferson Parish Hospital District No. II v. Hyde,* 466 U.S. 2, 21 (1984). The determination of the existence of two separate product markets is derived not from the functional relationship

between the products, but rather from the consumer's independent demand for each of the items, separately. *Collins v. Associated Pathologists, Inc.*, 844 F.2d 473, 477 (7th Cir. 1988). No such consumer-based proof necessary to separate, in the public's eye, the Hospital services (a tying product) from the echocardiogram and stress test (the tied product) exists in this case. Assuming there did exist such duality, Nanavati further failed to demonstrate the existence of "market power"— the economic force necessary to compel consumers to use the tying product thereby enabling the Hospital to foist the tied product upon them. *Jefferson Parish,* 466 U.S. at 13, 14. Further, such "market power" or dominance is not the by-product of mere patient convenience. *Seidenstein v. National Medical Enterprises, Inc.*, 769 F.2d 1100, 1106, n. 2 (5th Cir. 1985). No market *per se* for either the tying or tied product was ever demonstrated.

Moreover, no testimony exists from which to conclude that the Hospital exploited its control over medical or surgical services (even assuming requisite market power) by requiring patients to have echocardiagrams or stress tests once hospitalized. *See Jefferson Parish,* 466 U.S. at 12. Therefore, no tying existed.

Finally, the Hospital, having derived no income from the tied product-representing the professional service of reading the tests, was not a competitor in the market of the tied product.

> The Hospital is not a competitor in the market of the tied product. It receives no part of the fee for interpreting the scans. In this respect the case differs from *Jefferson Parish* where the Hospital

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12. The absence of expert testimony in this regard, "Augurs strongly in favor of granting summary judgment against an antitrust plaintiff". *Drs. Steuer and Latham,* 872 F. Supp. at 1512, n. 25; *see, e.g. Military Service Realty, Inc. v. Realty Consultants of Virginia,* 823 F.2d 829 (4th Cir. 1987).

> and the anestheologists shared the fees for anesthesiological services . . . The lack of the Hospital's economic interest in the tied product is sufficient to defeat Dr. White's tying claim under either theory that he presses.

White v. Rockingham Radiologists, Ltd., 820 F.2d 98, 104 (4th Cir. 1987).

Therefore, Nanavati's reliance upon *Continental Ore* is immaterial.

IV.

Nanavati's failure to prove an anti-trust claim forecloses any entitlement to nominal damages and counsel fees.

As can be seen by reference to Points II and III above, Nanavati simply failed to make out the full compliment of antitrust elements with respect to any type of claim he now asserts. The mere labeling of the Executive Committee as a "section one combination" with respect to the revocation of privileges decision does not, alone, entitle Nanavati to damages, even nominal damages. He must prove the entirety of an anti-trust claim, not just selected component parts thereof. Any "damages" claimed by Nanavati were not related to his five day revocation and (even if such causation exists), proven to be other than personal as to him. *See Brunswick Court v. Pueblo Bowl-0-Mat, Inc.*, 429 U.S. 477, 489 (1977); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 125 (1969). Moreover, Nanavati failed to request nominal damages in the charge to the jury and failed to complain on appeal below of his entitlement to them. *U.S. Football League v. National Football League*, 644 F. Supp. 1040, 1054, n. 11 (S.D.N.Y. 1986). *aff'd*, 842 F.2d 1335 (2d Cir. 1988); *Herman Schwabe, Inc. v. United Shoe Manufacturing, Inc.*, 297 F.2d 906

(2d Cir. 1962), *cert. denied,* 369 U.S. 865 (1972). *See Youakim v. Miller, Director Department of Children & Family Services,* 425 U.S. 231 (1976). Thus, Nanavati is not entitled to a "clear pronouncement" on a non-existent claim.

Finally, no dispute exists that nominal damages are available to an anti-trust plaintiff, when requested, if the fact of actual damages is proven. Therefore, Nanavati petitions for writ of certiorari to correct, at best, an error below entirely personal as to him, bereft of national import. *See* R.L. and E. Grossman, *Supreme Court Practice,* § 4.15, pp. 295-296 (5th Ed. 1978).

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be denied.

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